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Supreme Court of the United States

October Term, 1977

No. 77-343

PASQUALE J. CISTERNINO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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For the Sixth Circuit

Petitioner, Pasquale J. Cisternino, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (Appendix, *infra*, pp. 1a-12a) is reported at 549 F.2d 1088.

JURISDICTION

The judgment of the Court of Appeals (Appendix, *infra*, pp. 1a-12a) was entered on February 22, 1977. On August 3, 1977, the Court of Appeals denied a petition

for rehearing (Appendix, *infra*, p. 13a). The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1).

QUESTIONS PRESENTED

Convicted of a single count of conspiracy on an indictment which charged two separate counts of conspiracy against two entirely different groups of defendants, petitioner submits that the following questions are raised:

(1) Whether an indictment which charged petitioner simply with conspiring with one "Michael James Ryan aka Willie," with no allegation that petitioner conspired with any other named or unnamed persons, was improperly amended at trial by an instruction to the jury which permitted conviction to rest upon a finding that petitioner had conspired with at least one other person "whether a defendant or not and whether named in the indictment or not," and which repeatedly informed the jury that the indictment charged a conspiracy between petitioner and other persons named in a separate conspiracy count of the indictment or between petitioner and other persons unknown?

(2) Whether the trial judge was required to advise petitioner of the risks attendant upon representation by the same attorney who represented two co-defendants charged with an entirely separate, but jointly tried, conspiracy offense?

(3) Whether a jury instruction advising that "every witness is presumed to speak the truth," in a trial in which the government's case consisted almost exclusively of the uncorroborated testimony of a single accomplice witness and in which the defendant offered no evidence, invades the presumption of innocence and constitutes plain error?

(4) Whether a comment made to the jury in a supplemental instruction delivered after four days of deliberations following a 4½ day trial, advising the jury that there was "no reason to believe * * * that more detailed or precise evidence could be produced on behalf of any of the parties to this litigation," constituted comment upon the failure of the petitioner to testify or to present evidence?

(5) Whether the district court erred in denying a motion for severance upon an indictment which charged two separate counts of conspiracy against two entirely separate groups of individuals, where no individual was named as co-conspirator in both conspiracy counts?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portion of the Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * *; nor shall any person * * * be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *.

The pertinent portion of the Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; * * * and to have the Assistance of Counsel for his defense.

Section 371 of Title 18 of the United States Code provides, in pertinent part, as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, * * * and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner was indicted on April 24, 1975, in the United States District Court for the Northern District of Ohio, Eastern Division. The eighteen-page indictment named fifteen defendants and contained six separate counts. Counts I, III and V charged conspiracies to steal and to possess 25,000 pairs of levis stolen from a railroad trailer in Cincinnati while en route to Kentucky, in violation of 18 U.S.C. 371. Counts II, IV and VI charged violations of 18 U.S.C. 2 and 659 arising out of the theft and possession of the stolen goods.

Petitioner was charged only in Counts V and VI of the indictment. He was named, however, in nine of the forty-nine overt acts contained in Count III which charged twelve of the other named co-defendants, two unindicted co-conspirators, "and other individuals unknown to the grand jury," with conspiring to possess the same property referred to in Count V.

Count V of the indictment, the sole charge upon which petitioner was ultimately convicted, charged only petitioner and "Michael James Ryan aka Willie" as conspirators (J.A. 15). It named no unindicted co-conspirators, nor did it charge participation of "other individuals unknown to the grand jury" as did Count III (J.A. 4). However, the overt acts set forth in Count V named Emund E. Flott, an unindicted co-conspirator in Count III, as a participant in nine of the eleven overt acts. In addition, one of the persons jointly tried with petitioner and named as a defendant in Count III of the indictment, James Alan Blanton, was named as a participant in an overt act in Count V (J.A. 16-17). All but two of the eleven overt acts set forth in Count V were also included in Count III (J.A. 10-14, 16-17).

On May 27, 1975, prior to trial, the court conducted a hearing at which it instructed the attorney who was representing petitioner and two of the defendants named in Count III of the indictment to discuss with his clients the possibility of conflict arising out of joint representation. The court directed the attorney to retire with his clients to a room made available by the court "to discuss these matters and then report back to the court subsequently on concluding these discussions" (H. Tr. 4).* At the conclusion of counsel's conference with petitioner and the other two co-defendants, the court asked counsel:

> Mr. Giuliani, have you had an opportunity of discussing with your clients the subject matter of the court's discussion with you? [H. Tr. 7]

Counsel responded that he had discussed the matter and that it was his conclusion that "there is no conflict of interest," and that his clients would "waive any possibility of any conflict that may occur at the trial of this case" (H. Tr. 7). Petitioner acquiesced in that representation (H. Tr. 8).

Trial commenced against petitioner and five of the defendants named in Count III on June 9, 1975. The only other conspirator named in Count V, Michael James Ryan, was severed when he appeared without counsel on the day of trial (J.A. 22).

The evidence demonstrated that 875 cartons of Levi-Strauss clothing were stolen from interstate commerce on December 19, 1974. The primary evidence offered by

* "(H. Tr.)" refers to the separate transcript of the hearing conducted on May 27, 1975.

the government to establish a connection between that theft and each of the named defendants was the testimony of one Edmund E. Flott. As the Court of Appeals observed, "It was Flott's testimony which linked each appellant to the stolen goods." (App., p. A1). The Court of Appeals also accurately and succinctly characterized Flott's testimony as follows:

> Flott's testimony was central to the Government's case and defense counsel vigorously attacked his credibility during cross-examination and final argument. On the stand, Flott admitted *inter alia* that he had an extensive criminal record including convictions for armed robbery, bank robbery, receipt of stolen property and escape and that he had been imprisoned nearly half his life; that while in prison in 1963 he had become an FBI informant; that he continued as an informant for four years following his release from prison and was paid between $2,000 and $3,000 for information; that he agreed to testify in this case only after his FBI contact informed him that the Bureau had evidence of his complicity in the crime; that he had not been charged with the crime even though he had admitted guilt; that he had agreed to make a statement on condition that he and his family be relocated and that relocation had occurred; that the Government was paying him $1,060 in monthly subsistence payments; that he had threatened at least one of the defendants; and that he would do almost anything to keep out of jail. He also testified that he had failed to report to the FBI all criminal activity of which he was aware, particularly if he or one of his close associates was involved. [App. pp. A9-A10].

At trial, Flott testified that he was contacted by Blanton concerning the stolen clothing, that he was asked whether he could get rid of the clothing, that he made several unsuccessful efforts to do so, and that he ultimately

made arrangements to sell the clothing to petitioner and to an individual named "Willie" whom Flott knew by no other name (J.A. 51).

Early in the trial, counsel for petitioner objected to the admission of a statement of one of the defendants named in Count III on the ground that it was not admissible against petitioner (Tr. 92-93). Counsel for the government acknowledged that petitioner "who is named only in Counts V and VI, may be entitled to a proper instruction with regard to statements made in furtherance of the other conspiracies which are not applicable" to petitioner (Tr. 94). At that point, counsel for petitioner requested a separate trial in light of the complexity of the testimony that would be offered with respect to charges unrelated to Count V (Tr. 95). The motion was denied. It was subsequently renewed when counsel for petitioner complained of the prejudice to petitioner arising out of the joint trial of separate conspiracies against separate defendants (Tr. 562-63). Again, the motion was overruled.

Petitioner presented no evidence at trial.

In its charge to the jury, the court advised that the entire indictment would be with the jury during its deliberations (J.A. 91). The court combined its charge concerning the elements of the separate conspiracies charged in Counts III and V of the indictment. (J.A. 96-113). In the course of the charge, he referred to a single "conspiracy" charged in Counts III and V upon at least ten occasions (J.A. 88, 98, 100, 101, 105). He advised that the government was required to prove, among other things,

> that two or more persons, including one or more of the accused, were knowingly members of the conspiracy as charged in the indictment. [J.A. 100].

Instructing further upon the party dimension of the conspiracy charge, the court stated:

The indictment charges a conspiracy among the respective defendants named in Counts III and V respectively of the indictment, and others, some of whom are named in the respective counts of the indictment as co-conspirators but not as defendants, *and other persons unknown to the grand jurors.* A person cannot conspire with himself and therefore you cannot find any of the defendants guilty unless you find beyond a reasonable doubt that such defendant or defendants participated in the respective conspiracy in which such defendant is respectively charged in the indictment *with at least one other person named in such count, whether a defendant or not, and whether named in the indictment or not.* [J.A. 101-102] (Emphasis added).

After listing each of the fifteen defendants named in the indictment, the court instructed the jury that the guilt or innocence of Michael James Ryan, aka Willie, was no longer before it (J.A. 86), and that it should concern itself only with the guilt or innocence of the defendants on trial (J.A. 87). The indictment was read to the jury, however, as written (J.A. 88-91). After reading the indictment, the court stated that the only defendant charged in the conspiracy alleged in Count V was petitioner (J.A. 91).

The jury was instructed:

> The evidence in the case need not establish * * * that all of the persons charged to have been members of the alleged conspiracy were such. [J.A. 100].

In the course of advising the jury concerning the manner in which it was to determine credibility of witnesses, the court stated:

> Every witness is presumed to speak the truth; however, if you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves. [J.A. 115-16].

After four-and-a-half days of deliberations and two announcements that the jury was deadlocked (J.A. 125, 128-29), the court, over objection, delivered an *Allen* charge. In the course of that supplemental instruction, the court announced:

> There appears no reason to believe that another trial would result in a better or a more extensive presentation by the various sides to this litigation than that which has been made to you.
>
> * * * * *
>
> So there appears no reason to believe that the case would ever be submitted to 12 men and women more conscientious, more impartial, or more competent to decide it, or that more detailed or precise evidence could be produced on behalf of any of the parties to this litigation. Upon reflection, this must be self-evident to each of you who have heard all of the evidence in this case. [J.A. 136].

As the Court of Appeals observed, "Within an hour of receiving the supplemental instruction, the jury returned a verdict" (App., p. A2). Petitioner was found guilty of the conspiracy offense charged in Count V and not guilty of the substantive offense charged in Count VI (J.A. 141).

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals' assessment of the impact of a jury instruction which permitted conviction to rest upon proof that petitioner had conspired with persons other than an indicted co-conspirator is in conflict with this Court's decision in *Stirone v. United States*, 361 U.S. 212. In *Stirone*, a jury instruction which permitted a Hobbs Act conviction to rest upon proof that the defendant's conduct had impact upon the exportation of steel from Pennsylvania, when the indictment charged an effect upon importation of sand to Pennsylvania, was characterized as a constitutionally impermissible amendment of the indictment:

> Although the trial court did not permit a formal amendment of the indictment the effect of what it did was the same. * * * While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. [361 U.S. at 217].

Here, the trial court amended the indictment far more drastically than in *Stirone*. Petitioner was charged in only one of three conspiracy counts contained in a single indictment. The charge, Count V, named only petitioner and "Michael James Ryan aka Willie" as co-conspirators. It named no unindicted co-conspirators. It did not allege a conspiracy with unknown persons.

The trial court, however, in an apparent effort to consolidate the instruction on Count V with a separate conspiracy count against entirely different defendants, thoroughly altered the indictment with virtually every word he uttered.

First, the court relieved the government of the burden of proving the specific party dimension of the offense charged in Count V by advising the jury that it was not to concern itself with the guilt or innocence of Ryan (J.A. 86-87). Because Ryan was the only person charged as a co-conspirator with petitioner, the government was required to establish guilt of both in order to prove guilt of either. *United States v. Masiello*, 235 F.2d 279 (2nd Cir. 1956), *cert. denied*, 352 U.S. 882.

Next, the court specifically advised that the jury was not required to find that Ryan participated in the offense charged in Count V by stating:

> The evidence in the case need not establish * * * that all of the persons charged to have been members of the alleged conspiracy were such. [J.A. 100].

Combined with the earlier statement that Ryan's guilt was not in issue, this statement entirely relieved the government of the burden of proving Ryan's participation. Had any question remained, it was resolved by the statement that the evidence was sufficient if it established

> * * * that two or more persons, *including one or more of the accused*, were knowingly members of the conspiracy as charged in the indictment. [J.A. 100]. (Emphasis added).

Having relieved the government of the burden of proving the charge made, the court went on to authorize conviction on a charge not made. This was accomplished, in part, by repeatedly referring to a single "conspiracy" in Counts III and V of the indictment (J.A. 88, 98, 100, 101, 105). Both counts involved the same stolen property, the same time period, and the same objective—a violation of 18 U.S.C. 659. By consolidating the instruction on both counts, the critical distinction between the two, *the fact that each charged entirely different parties*, was quickly forgotten. The court erroneously stated:

> The indictment charges a conspiracy among the respective defendants named in Counts III and V respectively of the indictment, and others, some of whom are named in the respective counts of the indictment as co-conspirators but not as defendants, and other persons unknown to the Grand Jurors. [J.A. 101].

This statement is totally false in the following respects: (1) The indictment *does not* charge "a conspiracy among the respective defendants named in Counts III and V," it charges separate conspiracies among the particular persons charged in each count; (2) Count V *does not* charge, as the instruction states, a conspiracy between petitioner "and others * * * named * * * as co-conspirators but not as defendants," it charges only petitioner and Ryan; and (3) Count V *does not* charge a conspiracy with "other persons unknown to the Grand Jurors," although Count III contains such an allegation.

The statement of the court thoroughly confused the two charges and amended Count V to broaden the party dimension of the charge to include the defendants named in Count III, persons named as co-conspirators but not as defendants, and persons unknown to the grand jury. This extraordinary amendment of a count which charged only a conspiracy between two named individuals was further broadened when the court added that a defendant might be convicted upon proof of participation

> * * * with at least one other person named in such count, whether a defendant or not, and whether named in the indictment or not. [J.A. 102].

With this confusing statement, the court expressly permitted the jury to find a conspiracy between petitioner and Edmund Flott or James Blanton, individuals named in Count V as participants in overt acts, *or between petitioner and anyone else in the world.*

The original charge of a conspiracy solely between petitioner and Ryan was converted into a charge between petitioner and anyone. This is, as numerous courts have held, an intolerable amendment of the indictment.[1] The charge was amended after all evidence had been presented and all opportunity to defend against the new charge had concluded. In such circumstances, it is not appropriate to characterize the instruction, as did the court below, as one which simply "lacked a degree of clarity." (App. p. A7). The only proper portion of the instruction came when the charge contained in Count V was read to the jury. But the indictment was specifically repudiated by the instruction. It is not appropriate in such circumstances to impose upon the defendant, as did the court below, the burden of demonstrating prejudice arising from the amendment, although prejudice is manifest. *Stirone v. United States, supra.* Such patent violation of the Fifth Amendment right to be tried only on charges presented in an indictment returned by a grand jury and of the Sixth Amendment right to adequate notice of the accusation should not go unnoticed. Clear and distinct notice of the charges is particularly important in a conspiracy case, as this Court has clearly recognized:

> The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place. [*Kotteakos v. United States,* 328 U.S. 750, 774].

Here, the "transference of guilt" was impermissibly invited by a jury instruction which failed to distinguish between separate conspiracies and separate conspirators.

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[1] See, e.g., *United States v. Bostic,* 480 F.2d 968 (6th Cir. 1973); See also, *Gaither v. United States,* 413 F.2d 1061 (D.C. Cir. 1969); *United States v. DeCavalcante,* 440 F.2d 1264 (3rd Cir. 1971).

II.

Petitioner was represented at trial by the same attorney who represented two other co-defendants charged in entirely separate counts of the indictment. Aware of the fact of joint representation, the trial court, before trial, instructed petitioner's attorney to explain to him and the others whom the attorney represented the possibility of conflict arising out of joint representation. The court did not explain any of the possible conflicts or risks attendant upon joint representation, but left this matter entirely to counsel. The court insisted, after counsel had discussed the matter with petitioner, that counsel and petitioner advise the court that there was no conflict of interest and that petitioner would "waive any possibility of any conflict that may occur at the trial of this case." (H. Tr. 7).

While the procedure employed by the court may have been well designed to protect the court against the necessity of declaring a mistrial, it was hardly adequate to protect petitioner's interest in enjoying the effective assistance of counsel. It is not, as this Court long ago observed, merely conflicts of interest which may impair counsel's effectiveness:

> Irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness. [*Glasser v. United States*, 315 U.S. 60, 75].

Here, the burden of joint representation was clearly overwhelming. The only connection established between petitioner and his co-defendants at trial was the fact that both were represented by the same attorney. The attorney was unable to assist the jury in separating the complex and separate charges against the separate defendants, to compare the evidence against petitioner's co-defendants to that offered against him, to dissociate petitioner from all co-

defendants, to insist that evidence admissible against others not be considered against petitioner, or to focus solely upon the intricate legal problems which concerned petitioner solely. Unfortunately, this Court's warning in *Glasser v. United States, supra*, was ignored:

> In conspiracy cases, where the liberal rules of evidence and wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant, *it is especially important that he be given the benefit of the undivided assistance of his counsel without the court becoming a party to the encumbering of that assistance.* [315 U.S. at 76]. (Emphasis added).

The problems created by joint representation of co-defendants in criminal trials, particularly in conspiracy cases, has been the subject of controversy, comment and confusion. It has led to a recommendation that joint representation be barred except in the most extraordinary circumstances.

> The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation.[2]

Judicial awareness of the dangers inherent in joint representation of co-defendants has led to adoption of conflicting standards defining the duty imposed upon trial courts to apprise defendants of the risks attendant upon joint representation. The United States Court of Appeals for the First Circuit, for example, instructed in *United States v. Foster*, 469 F.2d 1 (1st Cir. 1972), that in all

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[2] AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE DEFENSE FUNCTION (1971), Section 3.5(b).

criminal trials conducted in that Circuit where one attorney speaks for two or more defendants

> * * * it shall be the duty of the trial court, as early in the litigation as practicable, to comment on some of the risks confronted where defendants are jointly represented to insure that defendants are aware of such risks, and to inquire diligently whether they have discussed the risks with their attorney, and whether they understand that they may retain separate counsel * * * . [469 F.2d at 5]

The United States Court of Appeals for the Seventh Circuit has adopted a similar, although not identical position, by requiring a trial court to investigate the relevant facts, advise the defendant, and determine whether continued representation of several defendants by a single attorney would violate the Sixth Amendment, whenever the possibility of conflict of interest arises during the trial. *United States v. Gaines*, 529 F.2d 1038, 1043 (7th Cir. 1976). The same court, however, declined, in *United States v. Mandell*, 525 F.2d 671 (7th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976), to adopt a rule which imposes an absolute obligation upon a trial judge to conduct an inquiry concerning knowing waiver of single representation at the outset of any criminal trial in which defendants are jointly represented. On the other hand, an absolute obligation to conduct such an inquiry is imposed in the District of Columbia. See, *Lollar v. United States*, 376 F.2d 243 (D.C. Cir. 1967); *Campbell v. United States*, 352 F.2d 359 (D.C. Cir. 1965).

The government itself has demonstrated a keen awareness of the problems involved in joint representation and has, on occasion, sought to prohibit an attorney from representing several individuals in the same matter. See, *e.g., In Re April 1975 Grand Jury*, 531 F.2d 600 (D.C. Cir. 1976).

In the instant case, the court adopted a procedure which represents a combination of those applied in the Second Circuit and in the Seventh Circuit. Inquiry was made concerning the issue of representation before trial commenced. However, the inquiry was not conducted by the judge in open court. Rather, the attorney who represented several defendants was charged by the court with responsibility to inform his clients of the dangers of joint representation. Consequently, the record does not reflect what the clients were told. It is not possible, therefore, to determine from the record whether there was a knowing and intelligent waiver of the right to single representation and an understanding acceptance of the actual risks attendant upon joint representation. This Court has refused to predicate a finding of waiver of the constitutionally protected right to the assistance of counsel on a record which does not affirmatively demonstrate such a waiver. See, *e.g., Carnley v. Cochran*, 369 U.S. 506. The same principle is appropriately applied where the waiver involved concerns the right to single representation.

The manner in which a court is to proceed for the purpose of protecting against possible impairment of the Sixth Amendment right to counsel arising out of joint representation of multiple defendants is an issue of major importance to the administration of criminal law. The defense bar is acutely in need of guidance concerning this matter. The government has a keen interest in guarding against some of the consequences of joint representation. Trial courts require guidance concerning the proper procedure to be employed to protect defendants' rights. Courts of appeals, having arrived at conflicting decisions concerning the proper role of the trial judge in dealing with joint representation, require a definitive resolution of this recurring federal constitutional question. Finally, unless this Court offers direction to federal courts which will

permit uniform and intelligent resolution of problems presented by joint representation, the principles adopted by this court in *Glasser v. United States,* 315 U.S. 60, will be seriously eroded.

III.

Petitioner was tried and convicted on the uncorroborated testimony of one Edmund Flott. Flott admitted involvement in the offenses charged in the indictment, acknowledged an extensive felony record, and agreed that he had been persuaded to testify by promises of leniency, relocation and money. Petitioner offered no evidence in his own behalf.

In these circumstances, the court improperly instructed the jury that, "Every witness is presumed to speak the truth." (J.A. 115). The presumption-of-truthfulness instruction has been unanimously condemned by every court which has been called upon to consider the charge. See, *Cupp v. Naughten,* 414 U.S. 141, 144, fn. 4. Despite constant disapproval of the charge, it continues to be given in federal trials. See, *e.g., United States v. Maselli,* 534 F.2d 1197 (6th Cir. 1976).

While this Court, in a divided opinion in *Cupp v. Naughten, supra,* declined to hold that the presumption-of-truthfulness instruction by itself violated due process of law, it recognized that all federal appellate courts which have dealt with the instruction have, in the exercise of their supervisory power, sought to prohibit use of the charge. The case at bar demonstrates that those efforts have been unsuccessful.

It has become evident that use of the presumption-of truthfulness instruction raises an important question of federal law which has not been, but should be, settled by this Court. Unless there is an unequivocal prohibition of

the charge by this Court, its use will continue in a manner which seriously threatens to impair the presumption of innocence and to dilute the requirement that the government prove guilt beyond a reasonable doubt. A clear decision from this Court on the question will inform attorneys that objection to the charge is appropriate and will apprise federal trial courts that the charge should not be given. Much judicial effort and many defendants' rights may be saved by such a ruling.

There was no objection at trial to the charge in the instant case. That was the sole basis upon which the court of appeals below affirmed petitioner's conviction (App., p. A5). Other courts, in virtually identical circumstances, have held that the instruction constitutes plain error requiring reversal.[3] Resolution of this conflict is an appropriate matter for this Court.

IV.

The jury did not find it easy to convict petitioner on the uncorroborated testimony of Edmund Flott. The length of deliberation exceeded the length of trial .

The trial court was able to overcome the jury's difficulties by delivering a supplemental instruction after 4½ days of deliberations and two announcements of deadlock. The supplemental instruction raises serious questions of constitutional magnitude.

Petitioner did not present evidence in his own behalf. A defendant's failure to testify or to present evidence, this Court has repeatedly held, may not be commented on by the prosecutor or the court. *Griffin v. California,* 380 U.S. 609; *Wilson v. United States,* 149 U.S. 60. Despite the unequivocal and oft-repeated command of this Court that

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[3] See, *e.g., McMillen v. United States,* 386 F.2d 29 (1st Cir. 1967), *cert. denied,* 390 U.S. 1031 (1968); *United States v. Birmingham,* 447 F.2d 1313 (10th Cir. 1971).

silence of the accused is not the proper subject of comment, the trial court persuaded the jury to return a verdict by stating:

> There appears no reason to believe that another trial would result in a better or a more extensive presentation by the various sides to this litigation than that which has been made to you. [J.A. 136.]

This statement clearly suggested to the jury that no defense had been presented *because none could be presented.* Were there any doubt, however, concerning the message of the court, such doubt was immediately resolved when the court added:

> So there appears no reason to believe * * * that more detailed or precise evidence *could be* produced on behalf of any of the parties to this litigation. Upon reflection, this must be self-evident to each of you who have heard all of the evidence in this case. [J.A. 136.] (Emphasis added).

The question of whether or not the defendant should testify or go forward with evidence in any case is a tactical decision which must be based upon an appraisal of the proof offered by the government. Here, the court translated the decision not to go forward into a factually unsupported and legally impermissible declaration that no defense was presented because none could be presented. Uttered by the court rather than the prosecutor, these words must have been interpreted to mean precisely what they said. What they said constitutes an impermissible invasion of the Fifth Amendment privilege against self-incrimination far more egregious than the often condemned observation of a prosecutor that the government's evidence has not been contradicted. See, *e.g., Linden v. United States,* 296 F. 104 (3rd Cir. 1924).

Preservation of the interests protected by the Fifth Amendment and prohibition of the excesses in which

courts sometimes engage in delivering supplemental instructions designed to yield a verdict can be accomplished by declaring that the charge given herein will not be tolerated.

V.

Petitioner was jointly indicted with fourteen other persons. Twelve of the other persons were named in the conspiracy charged in Count III of the indictment. None of those twelve defendants was charged in the conspiracy count in which petitioner was charged.

Six of the fifteen named defendants, including petitioner, were jointly tried. During trial, petitioner's counsel requested severance upon two occasions. His requests were denied.

The joint trial of petitioner and five other defendants named in entirely separate charges was in direct contravention of Rule 8(b) of the Federal Rules of Criminal Procedure, which provides:

> *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

As petitioner and his co-defendants were not "alleged to have participated in the same act or transaction or in the same series of acts or transactions," joinder of the two separate conspiracies was improper *ab initio.* See, *United States v. Marionneaux,* 514 F.2d 1244 (5th Cir. 1975).

Denial of the motion to sever was also in direct violation of the clear mandate of this Court announced in *Schaffer v. United States,* 362 U.S. 511:

> * * * [T]he trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear. And where, as here, the charge which originally justified joinder turns out to lack the support of sufficient evidence, a trial judge should be particularly sensitive to the possibility of such prejudice. [362 U.S. at 516.]

The prejudice which resulted to petitioner is manifest.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the Sixth Circuit Affirming Conviction

(Filed February 22, 1977)

No. 76-1580

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

PASQUALE J. CISTERNINO,
Defendant-Appellant.

APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

Before: PHILLIPS. *Chief Circuit Judge,* and CELEBREZZE and LIVELY, *Circuit Judges.*

CELEBREZZE, *Circuit Judge.* Appellants appeal their convictions on various counts of a six-count indictment which charged fifteen individuals with conspiracy and possession of goods stolen from interstate commerce in violation of 18 U.S.C. §§ 2, 371 and 659 (1970). The goods in question were 25,000 pairs of blue jeans stolen from a railroad trailer in Cincinnati, Ohio while en route from Knoxville, Tennessee to Florence, Kentucky. Appellants, and others named in the indictment, were tried jointly before a jury in the Northern District of Ohio, Eastern Division. The trial lasted eight days. The chief witness for the prosecution was Edmund Eugene Flott, an unindicted accomplice, co-conspirator and government informant. It was Flott's testimony which linked each Appellant to the stolen goods. At the close of trial and

after receiving instructions from the Court, the jury retired to consider a verdict. Twice during deliberations the jury informed the Court of its inability to reach a verdict and each time the Judge responded with the statement that the "jury will continue its deliberations with a view of arriving at a verdict." Finally, after several hours of deliberation over a four day period, the Judge issued an *Allen* charge. Within an hour of receiving the supplemental instruction, the jury returned a verdict. Appellant Brody was convicted of possession of goods stolen from interstate commerce as charged in count four of the indictment; Appellants LaRiche and Dal Pra were found guilty of conspiracy to possess goods stolen from interstate commerce as charged in count three of the indictment; and Appellant Cisternino was found guilty of conspiracy to possess stolen goods as charged in count five.

All Appellants join in arguing that the District Court erred in issuing the *Allen* charge. After the instruction was given, defense counsel uniformly objected to the charge. However, no specific objection was entered as to any particular portion of the charge so we must review the supplemental instructions under the "plain error" standard of Rule 52(b) of the Federal Rules of Criminal Procedure. *See United States v. Billingsley,* 474 F. 2d 63, 66 (6th Cir. 1973). In *United States v. Harris,* 391 F. 2d 348, 354 (6th Cir. 1968), this Court stated that "[W]e have no criticism with the *Allen* charge as such. . . . We are of the opinion however that . . . it approaches the limits beyond which a trial court should not venture in urging a jury to reach a verdict." *See also United States v. Scott,* No. 76-1805 at 3-5 (6th Cir. Jan. 7, 1977). Appellants do not contest the constitutionality of the *Allen* charge, but contend rather that the charge exceeded the

limits established by the Supreme Court in *Allen v. United States,* 164 U.S. 492 (1896). Specifically, they argue that the charge was defective because it: 1) improperly informed the jury that the case must be disposed of sometime; 2) failed to restate the Government's standard of proof; 3) erroneously informed the jury that their sole function was to find the truth; 4) coerced only a minority favoring acquittal to re-examine its position; and 5) improperly inferred that the failure to reach a verdict reflected unfavorably on the jury. In addition, Appellant Cisternino argues that the Court indirectly commented on his failure to take the stand and testify in his own defense. We find these contentions to be totally without merit.

At the outset, we note that instructions to the jury "may not be judged in artificial isolation but must be viewed in the context of the overall charge." *Cupp v. Naughton,* 414 U.S. 141, 147 (1973). *See also United States v. Lynch,* 477 F. 2d 924, 925 (6th Cir. 1973). Appellants urge that the instruction that the case "must be disposed of at some point in time" was coercive because it excluded the possibility that the jury could disagree and the case end in mistrial. For support, Appellants cite a number of cases which held it reversible error for an *Allen* charge to state that the case "must be decided." *See United States v. Jenkins,* 380 U.S. 445, 446 (1965); *United States v. Harris,* 391 F. 2d at 356-57; *United States v. Flannery,* 451 F. 2d 880, 883 (1st Cir. 1971). However, in *United States v. Harris,* 391 F. 2d at 356, we observed that there is "a clear distinction between the statement 'this case must be decided' and 'it must be disposed of some time.'" The latter phrase merely restates the obvious proposition that all cases must come to an end at some point, whether by verdict or otherwise. The "dis-

posed of" language in the charge should also be read in conjunction with the Court's admonition to the jurors to adhere to their individual judgment and conscience in reviewing the evidence presented them. Nor do we believe that the Court's failure to recharge the jury on the Government's burden of proof was plain error. While it may be desirable for a Judge to restate the beyond a reasonable doubt standard in an *Allen* charge, we doubt that under the circumstances the jury was influenced to disregard clear and explicit instructions on the prosecution's burden of proof in the original charge.[1] For similar reasons, we reject Appellants' argument that the Court's statement that the jurors "sole interest is to seek the truth from the evidence in the case" somehow distorted the jury's function and diluted the Government's burden of proof. *Accord, United States v. Lynch,* 477 F. 2d at 925. We do not accept Appellants' contention that the Court singled out the minority jurors in its instructions and placed them under undue pressure to conform their views to those of the majority. Appellants concede that this portion of the charge mirrors language approved in *United States v. Allen,* 164 U.S. at 501. We determine that the District Court's instructions afforded the defendants greater protection than did the charge in *Allen* because the instructions called on all jurors favoring conviction to rethink their positions, whether in the minority or majority. It would not be reasonable to conclude that the effect of the Court's language was to pressure the minority into acceptance of majority rule, particularly when read together with the instruction that "no juror is expected to yield a conscientious conviction he or she may have as to the weight or effect of evidence." *Compare United States v. Harris,* 391 F. 2d at 356. Nor do we find

[1] The Judge did, in fact, refer to the reasonable doubt standard when he urged the jurors favoring conviction to re-examine the correctness of their positions.

that there was any insult or threat implied in the Court's reference to the possibility of retrial before another jury, as Appellants contend. On the contrary, the tenor of the remarks was complimentary and supportive of the jury's efforts to reach a verdict. Appellant Cisternino claims that the Court's praise concerning both sides' presentation of evidence was, in actuality, "a thinly-veiled and insidious comment on his failure to testify." We do not accept that interpretation. We find no indication in the record that the language used by the Court was intended as a comment on Cisternino's failure to testify or that a jury would naturally assume it to be so. *See United States v. Sawyer,* 423 F. 2d 1335, 1340-41 (4th Cir. 1970). *See also United States v. Yamashita,* 527 F. 2d 954, 956 (9th Cir. 1975); *United States v. Banks,* 426 F. 2d 292, 293 (6th Cir. 1970); *Davis v. United States,* 357 F. 2d 438, 441 (5th Cir. 1966).

As part of the original instructions to the jury, the District Court made the following statement:

> Every witness is presumed to speak the truth; however, if you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves.

On previous occasions this Court has condemned the use of similar instructions in the exercise of our supervisory powers. *United States v. Maselli,* 534 F. 2d 1197, 1202-03 (6th Cir. 1976); *United States v. Stroble,* 431 F. 2d 1273, 1278 (6th Cir. 1970). *See also United States v. Griffin,* 382 F. 2d 823, 827 (6th Cir. 1967). In those cases, however, we held that the giving of the instruction is not, in the absence of an objection, plain error so as to require reversal in all cases. *United States v. Maselli,* 534 F. 2d at 1203; *United States v. Stroble,* 431 F. 2d at 1278. *See also United States v. Griffin,* 382 F. 2d at 828. No specific ob-

jection was entered by defense counsel to the presumption-of-truthfulness instruction. In *Cupp v. Naughten*, 414 U.S. at 149, the Supreme Court held that the giving of a presumption-of-truthfulness instruction in a state criminal proceeding was not a *per se* violation of due process. The Supreme Court noted that the circuit courts which have criticized the use of such an instruction did so in the exercise of their supervisory powers and not as a matter of constitutional law. *Id.* at 145-46. In determining the effect of the instruction on the defendant's conviction, the Supreme Court cautioned that the instruction should be judged in the context of the overall charge. *Id.* at 147. In upholding the instruction in *Cupp*, the Supreme Court commented that the presumption-of-truthfulness instruction came in the midst of the general charge on credibility where the jury was informed of various criteria for judging the credibility of witnesses. *Id.* at 149. In this case, the presumption-of-truthfulness instruction was also delivered as part of the overall charge on credibility. We conclude that the Court's extensive instruction on factors which would tend to discredit the testimony of witnesses, including that of the chief prosecution witness, vitiated what might otherwise have been plain error.[2] The record also does not support Appellants' allegation that the Government's closing argument contained a personal endorsement of Flott's credibility. No objection was made and the lengthy Government summation included a disclaimer of any personal knowledge of the case on the part of the prosecutors. The argument was not plain error. *See e.g., United States v. Phillips*, 510 F. 2d 134, 136 (6th Cir. 1975).

Appellant Cisternino raises three additional issues: 1) the Court's instructions improperly amended the in-

[2] The District Judge did not have the benefit of *United States v. Maselli*, *supra*, when framing the instructions.

dictment to allow him to be convicted of a conspiracy other than that described in count five of the indictment; 2) he was denied the effective assistance of counsel because of conflicts of interest which arose because his trial attorney also represented two other defendants; and, 3) there is insufficient evidence to support his conviction. We have considered Cisternino's arguments and find them to be meritless. Cisternino was charged under count five of the indictment of conspiring to possess stolen goods with "Michael James Ryan aka Willie." Cisternino was not named as a party to the conspiracy outlined in count three. Appellant argues that the Court constructively amended the indictment when the Jurge combined instructions on both conspiracy counts with a general instruction on conspiracy. According to Appellant, the confusion resulting from the Court's instructions allowed the jury to convict him of conspiring with someone other than "Willie" the co-conspirator named in count five of the indictment. If an indictment is amended during trial, a conviction on charges other than those found by the grand jury violates the Fifth Amendment. *See Stirone v. United States*, 361 U.S. 212 (1960). However, the indictment in this case was not amended by the Court's instructions. Although the method of instruction lacked a degree of clarity, whatever confusion may have been generated by the general instruction on conspiracy was dispelled by other portions of the charge wherein the Court carefully distinguished the conspiracy counts, identified the persons named in each count and related the elements of each offense in terms of the defendants charged. Viewed in their entirety, the instructions adequately apprised the jury of the distinctions between the two conspiracy

counts.[3] We also must consider the jury charge within the context of the trial. *United States v. Park*, 421 U.S. 658, 674-75 (1975). The evidence against the Appellant at trial went toward establishing a conspiracy between Cisternino and a man named "Willie". In light of the trial record, there is no realistic possibility that Appellant was convicted of conspiring with someone other than "Willie". The conspiracy instructions do not constitute reversible error.

We also conclude that Cisternino was not rendered ineffective assistance of counsel simply because his trial attorney also represented two of his co-defendants. To satisfy the requirements of the Sixth Amendment, a defendant must be represented by "counsel reasonably likely to render and rendering reasonably effective assistance." *Beasley v. United States*, 491 F. 2d 687, 696 (6th Cir. 1974). Where a conflict of interest is alleged, the defendant must show that there was a conflict and that he was prejudiced thereby. *See United States v. Georvassilis*, 498 F.2d 883, 886 (6th Cir. 1974). The defendant must suffer actual prejudice from the conflicting interests — the mere possibility of prejudice is not sufficient to overturn a conviction. *Ray v. Rose*, 535 F. 2d 966, 974 (6th Cir. 1976). Appellant has not demonstrated that he was prejudiced by his attorney's representation of two other defendants. His assertions to the contrary appear to stem more from the fact that he was tried jointly with others named in the indictment than from any conflict of

[3] The jury was also allowed to take the indictment into the jury room. While this practice was criticized in *United States v. Maselli*, 534 F. 2d at 1202, we have approved it in other cases. *See e.g., United States v. Russo*, 480 F. 2d 1228, 1244 (6th Cir. 1973); *Garner v. United States*, 244 F. 2d 575 (6th Cir. 1957). *Cf. United States v. Baker*, 418 F. 2d 851, 852-53 (6th Cir. 1969). We note that no objection was made by defense counsel at the time the indictment was submitted to the jury.

interest on the part of counsel.[4] There is also a strong indication of waiver in this case. *See generally Glasser v. United States*, 315 U.S. 60, 71 (1941). The District Judge held a hearing before trial with defendants and defense counsel present to raise the possibility of conflicts of interests arising due to the attorneys' multiple representation of defendants. At the hearing, Appellant Cisternino was warned of the possibility of a conflict of interest and expressly waived separate counsel. While the pre-trial hearing may not have sufficed if it became apparent at trial that there was an actual conflict of interest, *see United States v. Gaines*, 529 F. 2d 1038, 1044 (7th Cir. 1976), that occasion did not arise.[5] A review of the record discloses that Cisternino's trial attorney rendered reasonably effective assistance. Viewed in a light most favorable to the Government, *United States v. Hearn*, 496 F. 2d 236, 237 (6th Cir. 1974), the record also reveals there was sufficient evidence to sustain Cisternino's conviction.

Finally, Appellants allege that the trial court abridged their confrontation rights under the Sixth Amendment by impermissibly limiting the cross-examination of Edmund Eugene Flott, the prosecution's key witness. Flott's testimony was central to the Government's case and defense counsel vigorously attacked his credibility during cross-examination and final argument. On the stand, Flott admitted *inter alia* that he had an extensive criminal record including convictions for armed robbery, bank robbery,

[4] Appellant did not raise improper joinder as an issue on appeal.

[5] We do not lightly indulge in second guessing the trial strategy of defense counsel and a trial court need not speculate on all the myriad possibilities of conflict which may arise between a defendant and his attorney during trial. Yet if a real possibility of conflict arises, even during trial, the Court has a responsibility to inform the defendant of the risks involved and remind him that he has the option of changing counsel. *See generally United States v. Gaines*, 529 F. 2d at 1044; *United States v. Foster*, 469 F. 2d 1, 5 (1st Cir. 1972).

receipt of stolen property and escape and that he had been imprisoned nearly half his life; that while in prison in 1963 he had become an FBI informant; that he continued as an informant for four years following his release from prison and was paid between $2,000 and $3,000 for information; that he agreed to testify in this case only after his FBI contact informed him that the Bureau had evidence of his complicity in the crime; that he had not been charged with the crime even though he had admitted guilt; that he had agreed to make a statement on condition that he and his family be relocated and that relocation had occurred; that the Government was paying him $1,060 in monthly subsistence payments; that he had threatened at least one of the defendants; and that he would do almost anything to keep out of jail. He also testified that he had failed to report to the FBI all criminal activity of which he was aware, particularly if he or one of his close associates was involved. When defense counsel attempted to elicit details of his participation in unreported criminal activity, Flott refused to answer and invoked his Fifth Amendment privilege. The following colloquy then took place:

PROSECUTOR: Objection.

THE COURT: Approach the bench. (Bench conference ensued on the record as follows:)

DEFENSE COUNSEL: These things are all mentioned and involved, and I think it goes to the credibility of this man and the reasons why he is testifying the way he is.

THE COURT: There is ample ground for you to attack his credibility in the proper form. I will sustain the objection. Shall we proceed?

DEFENSE COUNSEL: So I don't have to come up again, you are saying I can't ask him about criminal activity at all?

THE COURT: No. All I said to you was that the objection was sustained, and I have directed you to proceed in a proper manner. Let's go ahead please.

After resuming cross-examination, counsel once again questioned Flott about his involvement in unreported criminal activity and the Court sustained the prosecutor's objection. Appellants contend that they were deprived of their Sixth Amendment right of confrontation because the Court improperly curtailed cross-examination. They argue that Flott's disclosure of unreported criminal activity waived his Fifth Amendment privilege as to the details of his participation.[6]

It is within the sound discretion of the trial court to limit the scope of cross-examination. *See e.g., United States v. Duhart,* 511 F. 2d 7, 9 (6th Cir. 1975). In exercising its discretion, the court must be mindful of both the defendant's Sixth Amendment right of confrontation and the witness's Fifth Amendment privilege against self-incrimination. The court may violate the confrontation clause if it prevents the defense from placing facts before a jury from which bias, prejudice or lack of credibility of a prosecution witness may be inferred. *Davis v. Alaska,* 415 U.S. 308 (1974); *Smith v. Illinois,* 390 U.S. 129 (1968); *Alford v. United States,* 282 U.S. 687 (1937). However, the defendant's right to delve into facts tending to discredit a prosecution witness cannot overcome the witness's privilege against self-incrimination, if properly invoked. *See Alford v. United States,* 282 U.S. at 694. We find that Flott properly invoked the Fifth Amendment concerning details of his participation in criminal activity

[6] We need not discuss Appellants' assertion that the Court should have allowed counsel to question the witness further out of hearing of the jury to establish the parameters of his assertion of privilege. The record discloses that the trial court's rulings were limited to the precise questions asked by counsel and did not amount to a "blanket prohibition" of questions concerning Flott's criminal activity, as Appellants suggest.

which had not been reported to the authorities. Although disclosure of an incriminating fact generally waives the privilege as to details, *see Rogers v. United States,* 340 U.S. 367, 373 (1950), waiver does not occur where further disclosure carries a risk of incrimination beyond that raised by previous testimony. *See United States v. Seavers,* 472 F. 2d 607, 610-11 (6th Cir. 1973); *In re Master Key Litigation,* 507 F. 2d 292, 294 (9th Cir. 1974). Since disclosure of the details of Flott's participation in unreported criminal activity would present a real and appreciable danger of criminal prosecution not raised by his testimony on direct, the Court was not in error in upholding his right to refuse to respond. Nor do we believe that the Court's rulings deprived Appellants of their confrontation rights under the Sixth Amendment. When a prosecution witness refuses to submit to cross-examination, it may be necessary for the trial court to strike all or part of his testimony. *See United States v. Stephens,* 492 F. 2d at 1374-75; *United States v. Cardillo,* 316 F. 2d 606, 610-11 (2d Cir. 1963). A defendant's rights do not bar the admission of the witness's testimony against him where the questions concern subject matter which is either collateral or cumulative and where the cross-examination is directed at the witness's general credibility rather than toward matters relating to the specific events of the crime charged. *See United States v. Garrett,* No. 76-1108 at 5 (6th Cir. September 29, 1976). In this instance, defense counsel was seeking evidence which would be both collateral and cumulative. Testimony concerning Flott's participation in criminal activity unrelated to the crime with which defendants were charged would be purely collateral to the issues at trial. If the purpose of the examination was to cast doubt on Flott's credibility, the questions were cumulative. The testimony provided counsel with an ample basis to effectively attack Flott's character and his motives for testifying for the prosecution. *See United*

States v. Stephens, 492 F.2d at 1375. *See also United States v. LaSorsa,* 480 F. 2d 522, 529 (2d Cir. 1973). We fail to see how testimony concerning crimes which were not reported to the FBI would elucidate further Flott's relationship with the Government, as Appellants contend. Under the circumstances, we must conclude that the jury had sufficient information upon which to make a discriminating appraisal of the witness's motives and bias without granting the defense access to highly incriminating evidence on crimes unrelated to those charged in the indictment. *See United States v. Baker,* 494 F. 2d 1262, 1267 (6th Cir. 1974). Appellants have made other arguments which we have considered and find to be without merit. The judgment of the District Court is affirmed.

Order of the United States Court of Appeals for the Sixth Circuit Denying Petition for Rehearing

(Filed August 3, 1977)

No. 76-1580

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PASQUALE J. CISTERNINO,
Defendant-Appellant.

Before: PHILLIPS and CELEBREZZE and LIVELY, *Circuit Judges.*

Upon due consideration of Appellant's Petition for Rehearing, it is ORDERED that said Petition be, and it hereby is, denied.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN
Clerk